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# Earl Rich v. Ernest Elder : Brief of Appellant

Utah Supreme Court

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Dwight L. King; Attorney for Defendant and Appellant;

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Case No. 8671

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

EARL RICH,

*Plaintiff and  
Respondent,*

-VS-

ERNEST ELDER,

*Defendant and  
Appellant.*

FILED

AUG 12 1957

Clerk, Supreme Court, Utah

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**BRIEF OF APPELLANT**

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DWIGHT L. KING

*Attorney for Defendant and Appellant*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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EARL RICH,

*Plaintiff and  
Respondent,*

-vs-

ERNEST ELDER,

*Defendant and  
Appellant.*

Case

No. 8671

---

## BRIEF OF APPELLANT

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### PRELIMINARY STATEMENT

Throughout this Brief plaintiff, Earl Rich, will be referred to as plaintiff and defendant, Ernest Elder, will be referred to as defendant or Elder.

This appeal arises out of a judgment in the amount of \$992.34 against the defendant and in favor of plaintiff entered on the 13th day of February, 1957. From the Findings of Fact, Conclusions of Law and Decree defendant Elder prosecutes this appeal.

## STATEMENT OF FACTS

The basic question from which this appeal was taken concerned the finding of the Trial Court that plaintiff was employed by defendant from approximately the 10th day of July, 1956 to the 18th day of July, 1957 and whether or not the plaintiff has earned a bonus.

All agreements between plaintiff and defendant were oral.

From November of 1955 through the 15th day of June, 1956 defendant employed plaintiff on his ranch in Carbon and Duchesne Counties. Defendant paid plaintiff \$200.00 a month and paid plaintiff's wife a sum of \$1.00 per person per day for any employees of defendant who boarded with plaintiff.

On June 15, 1956 the ranch was sold and possession delivered to the other defendant, M. H. Sharp. In conjunction with the transfer of the ranch, a herd of cattle, which were formerly owned by defendant were transferred to Sharp. Plaintiff was informed that from and after the 15th day of June his employment would be with M. H. Sharp. (R.61) Plaintiff and Sharp testified that Elder said that after certain hay was up then the cattle which were transferred to Sharp would have to be gathered and defendant would pay for the gathering. (R.61) Defendant denies that he agreed to pay for the gathering.

From the 15th day of June, 1956 to approximately the 6th day of July, 1956 plaintiff was in the employee of Sharp. On the 10th day of July, 1956 plaintiff claims that he returned to the employment of defendant. That he remained in the employment of defendant from the 10th of July to the 18th of July and hired other people to work for Elder and incurred obligations for their food and incidental expenses on behalf of Elder. On the 26th of July plaintiff was again back in the employment of Sharp and assisted Sharp in the removal of certain of the cattle sold and delivered by Elder to Sharp on the 15th of June, 1956. Defendant Elder denies that he ever employed plaintiff after the 15th of June and from that time on whatever work was done on the ranch in Carbon and Duchesne Counties or with cattle transferred was on behalf of Sharp.

Concerning the bonus. On January 17, 1956 defendant wrote to the plaintiff and made an offer which is contained in plaintiff's Exhibit No. 1, the offer contained the following language:

“In any event I would be willing to agree to pay you in addition to salary \$500.00 if at any time I sold the property.”

The letter contained several other matters upon which there was indicated it would be necessary to have a meeting of the minds between plaintiff and defendant and closed with the following phrase:

“Let me hear from you.”

Plaintiff never did respond to the letter of January 17, 1956. He continued on the ranch of defendant up through the 15th of June, 1956. During the month of March, 1956 defendant contemplated the employment of another person to take over the operation of the ranch and to be foreman over plaintiff, but the employment was not consummated because the employee could not come to work.

On June 15th plaintiff was paid by defendant and no mention was made of the bonus or any claim for it by the plaintiff. The June 15th payment was the last payment that was ever made by defendant to plaintiff. Thereafter there were conversations between plaintiff and defendant concerning the work which plaintiff did between the 10th day of July and the 18th of July. Plaintiff was making demands upon the defendant for the sums he claimed due for his wages and for monies which he claimed to have obligated defendant to pay. In none of these conversations was there any discussion of the bonus which plaintiff claimed and which the Trial Court awarded him.

The position of the defendant concerning the claim for wages was that the work performed from the 10th of July to the 18th of July was performed for Sharp. It consisted of the gathering of cattle owned by Sharp on which he sought a count both to check the number



of cattle sold by defendant in June of 1956 and also so that a loan could be negotiated.

Defendant's position concerning the bonus was that while the bonus was discussed with plaintiff there never was any bonus become due. First, defendant never had agreed to pay the bonus which was offered on January 17, 1956. Second, that the bonus was contingent upon the plaintiff rendering faithful, loyal and expert services to the defendant in the handling of the Nine Mile Ranch and the cattle thereon, and plaintiff did not render faithful, loyal and expert service in the handling of the cattle and refused to even discuss with defendant the numbers of cattle there were handled on the ranch. He failed to reveal to defendant exactly what had happened during the spring of 1956. It was also defendant's position that the bonus was contingent upon plaintiff not continuing in the employment of any transferee of the Nine Mile Ranch.

The only evidence concerning the obligations of defendant to pay plaintiff for the work performed between the 10th of July and the 18th of July and to show plaintiff's authority to obligate defendant to pay additional wages were two conversations. The conversations occurred, one on the 15th of June, 1956 and the other on the 4th of July, 1956. The conversation of July 4th was by telephone. Plaintiff called defendant from Price, Utah. Plaintiff claims that defendant agreed to employ him to

gather cattle and authorized him to employ anybody he saw fit to assist him. It is undisputed during the conversation defendant limited any expenditure on the part of plaintiff for food and supplies to \$25.00.

Between the 10th of July and the 18th of July plaintiff and several other men employed by him gathered certain of the cattle which were conveyed by defendant to Sharp. Present during the time that the cattle were gathered were the plaintiff, persons employed by him and Sharp. On the last day of the gather, the day that the count was to be made John Holmquist, a representative of Sharp's lending agency and Robert Elder, defendant's seventeen year old son, were present. Defendant stayed away intentionally because he did not believe a count feasible.

Defendant has steadfastly denied that he ever authorized plaintiff to employ anyone on his behalf or employed plaintiff to gather the cattle belonging to Sharp on the 10th of July, 1956.

## STATEMENT OF POINTS

### POINT I

NO CONTRACT OF EMPLOYMENT WAS EVER SHOWN BETWEEN PLAINTIFF AND DEFENDANT.

### POINT II

THERE WAS NO CONSIDERATION TO DEFENDANT FOR THE CLAIMED PROMISE TO PAY THE COST OF THE GATHERING.

## POINT III

THAT THE EVIDENCE FAILS TO SHOW ANY ACCEPTANCE BY PLAINTIFF OF DEFENDANT'S OFFER TO PAY A BONUS WHICH WAS CONTAINED IN THE LETTER OF JANUARY 17, 1956.

## POINT IV

PLAINTIFF FAILED TO RENDER FAITHFUL, LOYAL AND EXPERT SERVICES TO THE DEFENDANT AND AS A CONSEQUENCE DOES NOT HAVE GROUNDS TO CLAIM A BONUS.

## ARGUMENT

## POINT I

NO CONTRACT OF EMPLOYMENT WAS EVER SHOWN BETWEEN PLAINTIFF AND DEFENDANT.

The evidence which was presented by plaintiff and corroborated by the defendant Sharp at no place shows an offer by the defendant, Elder, to employ plaintiff for the purpose of gathering the cattle which had been transferred to Sharp. The evidence comes only from the mouths of plaintiff and Sharp.

The conversation on June 15, 1956 as recalled by plaintiff was as follows:

“Q. Mr. Elder told you what?

A. Told me that as of July 15th, June 15th it was, that I was on the ranch, that I was work-for Mr. Sharp. That all the responsibility was his. The expense. And we had the hay to put up then and he said they wanted me to go ahead

and put the hay up as fast as I could, and then they'd have to have the cows counted on the mountain. As quick as I could get the hay up I was to go to the mountain and gather the cows for the count.

Q. All right, what else was said?

A. As I remember it, Mr. Sharp come in then and he said when they go to the mountain to gather the cows they were working for you then. Mr. Elder said yes." (R.61)

The second conversation concerning the hiring of plaintiff was a telephone conversation between plaintiff and defendant. Concerning the conversation, plaintiff testifies as follows:

"Q. How did Mr. Sharp happen to be there? Had you made arrangements for him to meet you there?

A. No. I was there, I stopped there at the service station.

Q. In Wellington?

A. Yes. When I, I saw his truck coming down the road.

Q. You saw Mr. Sharp's truck?

A. Yes. So I hailed him down.

Q. All right. Now proceed and tell me what you stated to Mr. Elder and what he stated to you.

A. Well I don't remember exactly but I told him that we had the hay up and I was ready to go to the mountain to gather the cows. And he, well I asked him about hiring all the men I could

get to go up to gather them. And he said all right. Then I asked him about grub, groceries. And he said that I could come to Price and charge to him a bill of groceries to the extent of \$25. That was about all that was said.” (R.63)

In the cross examination plaintiff further elaborated concerning his conversation with the defendant as follows:

“Q. Mr. Rich, let’s see if we can get a few of these details down. You say you just happened to be at Wellington on the Fourth of July and made this call to Mr. Elder? About hiring these men?

A. Approximately after the Fourth of July, and I didn’t happen to be here, I was here for the purpose of getting ready for that gather.

Q. And Mr. Sharp happened to come along in his truck?

A. I don’t know on his part how he happened to be there, but I seen him coming down the road.

Q. Well this call that you made now, Mr. Rich, you were in doubt as to whether or not you had any authority to hire anybody on behalf of Mr. Elder or authority to charge any groceries to his account or act in any way on his behalf didn’t you?

A. I was not.

Q. You just, well then why were you calling him from Wellington to Salt Lake City if you

had no doubt about your authority?

A. To get him to confirm my authority to do it. Once more.

Q. Once more, is that right?

A. Yes.” (R.66)

It appears from the testimony of plaintiff when taken in its light most favorable to him that at no place had there been authorization to pay for the gathering of the cattle which were, at the time they were gathered, the property of Sharp. At best the conversations only indicate a willingness on the part of Elder that the gather be conducted at that time.

It seems strange that a person who would be responsible for the expense incurred would authorize the employment of an unlimited number of men to undertake to gather cattle belonging to another person. This is not the situation where the evidence is clear there was a mutual assent to the employment of plaintiff. The conversations did not take the form of an offer to employ and an acceptance of the offer.

Defendant denies that he ever employed plaintiff or authorized him to employ other persons on his behalf. Plaintiff and Sharp seek to show an agreement by Elder to pay for handling and gathering of Sharp's cattle. Plaintiff, at the time, was actually in possession of and handling property of Sharp and in his employment. The evidence is clear and is in fact undisputed that on the

15th of June plaintiff's employment with defendant was terminated and he was paid in full on that day for the services rendered.

Concerning the termination of services plaintiff stated as follows:

“Q. And you had a settlement with Mr. Elder on the 15th of June didn't you?

A. For the time being.

Q. You got a check from him?

A. I did.

Q. And you considered and knew and understood that to be payment in full for the services you had rendered him?

A. That's right, up until that time.” (R.68)

The employment claimed by plaintiff which commenced on the 10th of July was necessarily a new employment and for a specific job. No limitation was placed upon the plaintiff concerning the number of men he could hire, the time he could spend and the manner that he could proceed to accomplish the work. No limitations were placed, no control reserved or exercised. Plaintiff was handling Sharp's property and Sharp was present to supervise and control the operations.

Sharp was present at both the conversations. It was in his interest that the gathering of his cattle be accomplished. Would the owner of cattle permit a person, not his employee, to roundup, handle and move on his range his cattle without having control over him and

without being the party whose authority was being exercised?

It is respectfully submitted that the evidence considered as whole does not show a contract of employment by defendant.

#### POINT II

THERE WAS NO CONSIDERATION TO DEFENDANT FOR THE CLAIMED PROMISE TO PAY THE COST OF THE GATHERING.

The agreements marked Exhibit "A" and "B" transferred on 15th of June, 1956, all of the cattle on the Nine Mile Ranch and all of the forest, ranges, and ranch properties belonging thereto to the exclusive jurisdiction of Sharp.

The agreement, Exhibit "A", did not require that plaintiff count the cattle which were sold to Sharp but only provided that in the event a physical count of such livestock should show that there was not the minimum number and kind of livestock guaranteed an allowance would be made for the shortage. The agreement also provided that the closing date would be the first of July, 1956. Prior to that day on June 18, 1956 the cattle were accepted as to the contract by Sharp. See handwritten addition to the agreement Exhibit "A". Actually the work which was accomplished by plaintiff between the 10th of July and the 18th of July, 1956 had no value of any kind to the defendant Elder. The cattle counted



belonged to Sharp. He was anxious to know the number so that a loan could be made.

Elder did not believe a count feasible as an accurate check, Sharp insisted, however, on going ahead; Elder got nothing from what is now claimed to be his obligations.

The evidence shows that plaintiff was working for Sharp from the 15th of June through the 6th of July, 1956, putting up the hay on his ranch. The conversation of the 4th of July was therefore made between an employee of Sharp and Elder. The employees of Sharp were actually, in part, the same people who went upon the range and assisted plaintiff in the rounding up the cattle.

### POINT III

THAT THE EVIDENCE FAILS TO SHOW ANY ACCEPTANCE BY PLAINTIFF OF DEFENDANT'S OFFER TO PAY A BONUS WHICH WAS CONTAINED IN THE LETTER OF JANUARY 17, 1956.

The only evidence concerning a bonus which was presented by plaintiff was the letter of January 17, 1956. There can be no question about the letter having been written and its contents speak for themselves. It was admitted by plaintiff that he did not answer the offer made in the letter. At no time did he ever indicate that he would accept the terms and conditions of the letter. In March, 1956 defendant contemplated the hiring, and actually had made arrangements to hire, another person

to supersede plaintiff on the ranch and to take over the management of the cattle operation. The new foreman accepted other employment so there was no replacement for plaintiff.

When plaintiff was paid off on June 15, 1956 he freely admitted that the check given him on that date which did not take into account any bonus was in full payment for the services which he had rendered to Elder to that time.

Prior to the filing of the complaint Rich never made any claim for the bonus. On June 15, 1956 Sharp employed Rich to continue in his employment with him. One of the purposes of the offer made by Elder of the bonus was to insure that Rich would have continuous employment on the ranch either by himself or by a successor.

#### POINT IV

PLAINTIFF FAILED TO RENDER FAITHFUL, LOYAL AND EXPERT SERVICES TO THE DEFENDANT AND AS A CONSEQUENCE DOES NOT HAVE GROUNDS TO CLAIM A BONUS.

Following the transfer of the property by Elder to Sharp and the attempted count by Sharp of the cattle which were sold to him there arose a dispute over the number of cattle which were on the ranch on June 15, 1956. Elder was desirous of getting whatever reliable information he could concerning the number of cattle

that were handled by plaintiff during 1956.

Plaintiff stated that he did not keep a record which could be relied upon concerning the number of cattle handled. When asked to give his opinion of the number of cattle which were on the range in an affidavit he refused. Even though Elder, at the time, was willing to assume part of the expense of the gathering if an affidavit was given. This refusal by plaintiff to disclose information concerning his employer's business and necessary to the best interest of his employer demonstrates a complete lack of loyalty and faithfulness, to the party he claimed employed him.

Plaintiff claimed to be employed by Elder at all times prior to June 15th and from the 10th to the 18th of July to count cattle. Yet when asked to give an opinion concerning the number of cattle he thought were on the ranges he refused.

The law seems to be clear that an employee owes to his employer, whether the contract of employment specifically set it forth or not a duty of loyalty and faithfulness. *Carpenter Steel Co. v Norcross*, 204 F. 537, 35 *Am. Jur. Sec.* 40 P. 473.

A failure on the part of an employee to render faithful service may prevent his recovery of compensation for

service. In fact the rendering of faithful service is a condition precedent to the right to recover wages. *Sipley v. Stickney*, 190 Mass. 43, 76 N.E. 226, annotated at 5 Ann. Cas. 611.

The employees failure to perform his contract of employment in failing to render faithful service may be asserted as a partial or complete defense in an action to recover his salary. *Neely v. Wilmore*, 124 Ark. 460, 187 S.W. 637, 35 Am. Jur. Sec. 72 P. 502.

A cursory examination of the testimony shows a completely hostile attitude on the part of plaintiff toward defendant. On the 26th of July plaintiff rounded up some of the cattle he had gathered and loaded them on trucks at the ranch. Sharp, on August 9, 1956, before defendant attempted to obtain the affidavit from plaintiff had signed Exhibit B. The Exhibit contains a covenant that Sharp had not removed any cattle from the Freed Ranch to that time.

When the conversation between plaintiff and defendant occurred and the affidavit concerning the number of cattle on the ranch was requested plaintiff knew of the removal of cattle on July 26th. His failure to mention this vital fact demonstrates better than words his lack of loyalty or faithfulness. Why should an honest employee refuse his employer's request for a sworn state-

ment concerning the vital facts which he alone knew unless he was hiding from his employer what he knew, and acting against the employer's best interest. The actions of plaintiff seem even more strange when it is considered in the light of defendant's offer to pay \$200.00 on the account if the affidavit were given. Certainly an employer should be entitled to the information in the possession of his employee in a form on which reliance can be placed. Plaintiff demonstrated to whom his loyalty ran when he attempted to aid Sharp in concealing the removal of cattle on July 26, 1956. The evidence is consistent which only one finding that plaintiff was working for Sharp and not Elder. His actions show to whom his loyalty and faithfulness extended, and it is not defendant.

## CONCLUSION

It is respectfully submitted that the evidence in this action does not establish a definite contract of employment. There was no consideration to Elder for the employment of plaintiff. The great preponderance of the evidence shows that Elder is a victim of conspiracy between Sharp and the plaintiff. No offer to pay bonus was ever accepted by Rich and no faithful, loyal and efficient service entitling Rich to the claimed wages or

a bonus has been rendered to Elder. This Court should reverse the judgment of the lower Court and order that judgment be entered in favor of defendant and against plaintiff for no cause for action.

Respectfully submitted,

DWIGHT L. KING